Supreme Court, U.S.
FILED
[redacted] 7 2001
CLERK

No. 00-1021

IN THE

Supreme Court of the United States

RUSH PRUDENTIAL HMO, INC.,
Petitioner,

v.

DEBRA C. MORAN AND STATE OF ILLINOIS,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

JAMES T. FERRINI
MICHAEL R. GRIMM, SR.
MELINDA S. KOLLROSS
CLAUSEN MILLER P.C.
10 South LaSalle Street
Chicago, Illinois 60603
(312) 855-1010

JOHN G. ROBERTS, JR.*
CRAIG A. HOOVER
CATHERINE E. STETSON
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5810

*Counsel of Record

Counsel for Petitioner

IN THE

Supreme Court of the United States

No. 00-1021

RUSH PRUDENTIAL HMO, INC.,
Petitioner,

v.

DEBRA C. MORAN AND STATE OF ILLINOIS,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

SUPPLEMENTAL BRIEF FOR PETITIONER[1]

The Solicitor General agrees that there is a stark conflict between the circuits as to whether the "independent review" provisions of state laws governing HMOs are preempted by ERISA, and that this question "is an important one." Br. for the United States as Amicus Curiae at 9. *See id.* at 10 ("the question whether ERISA preempts state independent review statutes * * * is a question of substantial importance to many States and their citizens"); *id.* ("the Seventh Circuit's decision in [*Rush Prudential*] conflicts with the Fifth Circuit's decision in *Montemayor*").

Yet the Solicitor General recommends against a grant of certiorari because legislative proposals pending in Congress

---

[1] Petitioner's Rule 29.6 Statement appears at Pet. ii.

might—if passed and signed by the President—forestall the need for review here. *Id.* at 9, 13. This Court should not stay its hand in favor of the mere *potential* for legislative resolution of this critical question, over which the circuits are in conflict *now*.

As respondent acknowledges, the legislative proposals to which the Solicitor General refers are the subject of "partisan disagreement." Opp. at 2; *see also* Pet. 21. The Solicitor General likewise recognizes that although the Senate and the House of Representatives each passed a bill in the last Congress requiring HMOs to provide independent external review of benefit denials, "no bill on the subject was ultimately enacted into law." Br. for United States at 9. Indeed, the Solicitor General concedes that there are "significant differences" in the bills currently pending in Congress, including "differences in the scope of independent review, the incidents of that federally mandated review, and the remaining scope permitted for state laws in the area." *Id.* at 15; *see id.* at 9.

The bills currently pending are also comprehensive legislation, containing "numerous and varying other provisions addressing HMOs and other subjects." *Id.* at 15. Thus, even if, as the Solicitor General suggests, there is consensus that "some form of federally mandated external review is desirable," *id.*, the Solicitor General can hardly offer any assurance—or even hazard a wager—that a comprehensive healthcare bill containing such a provision will emerge from the sausage factory that is the legislative process in the foreseeable future. Far from it, in fact: the "other subjects" addressed by the comprehensive legislation are the subject of

intense debate.[2] *See* Petition for Certiorari, *Thomas* v. *Outboard Marine Corp.*, No. 85-1735, at 17 (Solicitor General sought certiorari despite "congressional agreement" on legislation addressing same issue, where there existed "substantial controversy between the House and Senate over other provisions," rendering the "prospects for and timing of final passage" of the bill "uncertain").

This Court typically turns aside the suggestion that it should not decide an issue of national import in a case that satisfies the stringent requirements for certiorari, *see* S. Ct. Rule 10(a), simply because Congress is concurrently considering the issue. *See* Br. for Respondent in *BMW of North America, Inc.* v. *Gore*, No. 94-896, at 14-15 (noting that "Congress has considered, as part of the legislative debate, virtually all the proposals that BMW and its amici seek to constitutionalize," and that "[t]o date, the House of Representatives and the Senate have each enacted legislation [imposing federal constraints on punitive damage awards] that is being reconciled in conference"). That is an appropriate response. It should come as no surprise that legal issues of national importance are also issues of interest to Congress. For this Court generally to refrain from deciding issues that Congress may—but may not—address would impede this Court in its historic task of resolving live circuit conflicts such as the one created by the Seventh Circuit's decision here.

Legislative proposals, even those being "actively consider[ed]" by Congress, Br. for United States at 9, are still just that: proposals. Particularly where such proposals are

---

[2] *See, e.g., Health Care Issues Await the New President*, Boston Globe, Jan. 16, 2001, at F1 ("For almost half a decade, Congress has been wrestling with different versions of the so-called Patients' Bill of Rights."); Patient Care, Vol. 35, Issue 7 (Apr. 15, 2001), at 2135 (noting "vigorous debate in Congress on one issue: whether patients should be allowed to sue their HMOs").

incorporated into a massive legislative undertaking that will doubtless be the subject of intense partisan debate and may languish at the end of this Congress, just as at the end of the last, the suggestion that this Court should stay its hand is not convincing. It is also a particularly cavalier response for the Solicitor General to offer, given the very real practical problems the current conflict poses for companies, insurers, HMOs, state regulators, and employees. *See, e.g.*, Br. of the National Association of Insurance Commissioners as Amicus Curiae in Support of Petition 7-9. This Court should review the conceded conflict in the courts and decide this question of national importance.

CONCLUSION

For the foregoing reasons, and those stated in the petition and reply, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JAMES T. FERRINI
MICHAEL R. GRIMM, SR.
MELINDA S. KOLLROSS
CLAUSEN MILLER P.C.
10 South LaSalle Street
Chicago, Illinois 60603
(312) 855-1010

JOHN G. ROBERTS, JR.*
CRAIG A. HOOVER
CATHERINE E. STETSON
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5810

*Counsel of Record

Counsel for Petitioner